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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

EUGENE DANNY GARCIA,

Defendant and Appellant.

F042781

(Super. Ct. No. 611156-1)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Fresno County. Alan Simpson, Judge.

Larry L. Dixon, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, Robert P. Whitlock and William K. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

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\*Before Vartabedian, A.P.J., Buckley, J., and Levy, J.

In December 1998, in Fresno County Superior Court Case No. 61156-1 (instant case), appellant Eugene Garcia pled guilty to one felony, viz., possession of heroin (Health & Saf. Code, § 11350, subd. (a)); two misdemeanors, viz., possession of drug paraphernalia (Health & Saf. Code, § 11364) and possession of a hypodermic syringe (Bus. & Prof. Code, § 4140); and one infraction, viz., possession of an open container while operating a motor vehicle (Veh. Code, § 23222, subd. (a)). Appellant also admitted allegations that he had served four separate prison terms for prior felony convictions (Pen. Code, § 667.5, subd. (b)). In May 1999, the court struck one of the prior prison term enhancements; imposed and stayed a five-year prison term; and placed appellant on five years' formal probation.

In December 2002, in Fresno County Superior Court Case No. 0207192-9 (Case No. 0207192-9), appellant pled guilty to possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a)). The court suspended imposition of judgment and placed appellant on two years' formal probation in that case, and revoked appellant's probation in the instant case. Subsequently, in February 2003, in the instant case, the court, after taking judicial notice of appellant's conviction in Case No. 0207192-9, found appellant in violation of the terms and conditions of probation; denied reinstatement of probation; and lifted the stay on the previously imposed five-year term. The instant appeal followed.

On appeal, appellant contends the court failed to conduct a formal probation revocation hearing prior to lifting the stay on the previously imposed prison term, thereby violating appellant's right to due process of law under the United States and California Constitutions. We will vacate the order denying reinstatement of probation and lifting the stay on imposition of the sentence, and remand for further proceedings.

## **PROCEDURAL BACKGROUND<sup>1</sup>**

In the instant case, as indicated above, in December 1998 appellant pled guilty to possession of heroin. In May 1999 the court imposed and stayed a five-year prison term and placed appellant on five years' formal probation.

In December 2002, appellant pled guilty to possession of a controlled substance in Case No. 0207192-9. Before accepting that plea the court asked appellant, "Do you understand if you're presently on parole or probation, that this change of plea could be a reason for finding you in violation?" Appellant responded, "Yes, I do, Your Honor."

On January 28, 2003,<sup>2</sup> appellant appeared for sentencing in Case No. 0207192-9. At that time the representative of the probation department informed the court "there is a violation of probation in [the instant case]" and that a hearing was scheduled on that matter for January 31. The probation officer asked for a continuance so that "[w]e'll have more direction on his existing probation case." Defense counsel indicated appellant was not aware of the hearing scheduled for January 31. The court noted appellant "has a right to be sentenced today if he wishes to"; appellant stated he wished to be sentenced; and the court suspended imposition of judgment and placed appellant on formal probation for two years.

On January 31, appellant appeared in court on the instant case. At that time, defense counsel asked for a continuance in order to "obtain the transcript of the Change of Plea in the [instant] case." The court stated, "We'll order a transcript of that proceeding so that we can review that prior to further action in this case. [¶] And in the meantime, Mr. Garcia, your probation in this matter is revoked and you're remanded on a no bail basis." The court set a hearing date of February 14.

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<sup>1</sup> The facts of the underlying offenses are not relevant to the issues raised on appeal. We will therefore forego a recitation of those facts.

<sup>2</sup> Further references to dates of events are to dates in 2003.

On February 14, appellant appeared in court with counsel. At the outset of the hearing, defense counsel informed the court that appellant “wishes to have this matter set for a contested hearing . . . .” The probation officer responded that appellant had pled guilty in Case No. 0207192-9, and stated that “the court can take judicial notice of that and find the defendant in violation of probation and we would be ready to go forward.” At that point, the court stated that it “[had] a Change of Plea transcript from [Case No. 0207192-9],” and read the portion of the transcript in which appellant stated that he understood that if he was “ ‘presently on . . . probation’ ” his plea “ ‘could be a reason for finding [him] in violation.’ ” The court then took judicial notice of the proceedings in which appellant pled guilty in Case No. 0207192-9, found appellant “in violation of the terms and conditions of probation in that case”; and stated, “in that case, sir, probation is denied and the five year stayed term is lifted.”

### **DISCUSSION**

Appellant argues that in probation revocation proceedings, due process requires, in addition to an initial preliminary hearing, a “second stage dispositional hearing” at which the probationer is entitled to have the court consider not only whether a probation violation occurred but, if so, whether there are “mitigating reasons or some other explanation for that failure which might have persuaded a reasonable judge to reinstate . . . probation,” and that the court, by “simply [taking] judicial notice of appellant’s guilty plea in [Case No. 0207192-9]” and going no further than finding that appellant had violated his probation, and on that basis lifting the stay on the sentence previously imposed in the instant case, “failed to provide appellant the dispositional hearing which constitutional due process requires.”

Appellant bases this contention in large part on *Morrissey v. Brewer* (1972) 408 U.S. 471 (*Morrissey*), *Gagnon v. Scarpelli* (1973) 411 U.S. 778 (*Gagnon*) and *People v. Vickers* (1972) 8 Cal.3d 451. In *Morrissey*, the United States Supreme Court addressed the minimum due process requirements for parole revocation. The court “set forth a two-

step procedure required in order to afford parolees due process of law: an initial preliminary hearing to determine whether probable cause exists to believe that a parole violation has occurred, and thus to justify temporary detention, and a more formal, final revocation hearing requiring factual determinations and a disposition based upon those determinations.” (*People v. Arreola* (1994) 7 Cal.4th 1144, 1152.) The following year, in *Gagnon*, the high court, extending the *Morrissey* protections to probationers, held that a probationer, like a parolee, is entitled to a preliminary and a final revocation hearing under the conditions specified in [*Morrissey*].” (*Gagnon v. Scarpelli*, *supra*, 411 U.S. at p. 782.) And in *Vickers*, decided prior to *Gagnon*, the California Supreme Court held the *Morrissey* protections applicable to probationers.

The People do not dispute that in a probation revocation proceeding a probationer has a due process right to a formal probation revocation hearing. They argue, however, that because the court took judicial notice of appellant’s guilty plea in Case No. 0207192-9, “[a]ll factual findings necessary to establish a violation of probation had occurred,” and therefore the procedure utilized by the court in revoking appellant’s probation satisfied due process requirements. The People base this contention chiefly on the following statement in *Vickers*: “There is nothing in [*Morrissey*] which forecloses a summary resolution of the issue of revocation if an undisputed course of conduct constitutes, as a matter of law, a violation of one or more conditions of parole. Whether a course of conduct and the attending circumstances are factually undisputed thus leaving open only questions of law is a matter as to which the hearing officer may make inquiry. If it appears, for instance, that upon a request by the hearing officer for a preliminary statement in the nature of an offer of proof by the parties the only matter in issue is the legal consequences of an undisputed course of conduct, the hearing officer may, without hearing any witness, rule on the matter.” (*People v. Vickers*, *supra*, 8 Cal.3d at p. 457, fn. 6.) The People argue that the “summary resolution of the issue of revocation” in the instant case did not violate appellant’s due process rights because the court’s taking of

judicial notice of appellant's guilty plea in the more recent case established an "undisputed course of conduct" which, as a matter of law, constituted a violation of probation. (*Ibid.*) We disagree.

In *People v. Coleman* (1975) 13 Cal.3d 867 our Supreme Court stated: "It is true that a conviction conclusively establishes the fact of a certain course of conduct by the person convicted. [Citation.] All that need be demonstrated to establish that a violation of probation has occurred is the fact of a new, post-probation conviction, the fact that such conviction or the conduct necessarily involved therein violated a condition of probation, and the further fact that such conviction was suffered by the particular probationer in question. [Citation.] [But] . . . when a court passes on the ultimate issue of whether probation is to be revoked, the court must decide more than merely whether, in light of an alleged conviction for a new offense, a violation of probation has occurred. If such be the case, the court must go on to decide whether under all the circumstances this violation of probation warrants revocation. [Citation.] *A probationer has a right to be heard and to present evidence on this issue as well as on the threshold issue of whether his probation has in fact been violated*, and a probationer thus has a right to a formal revocation hearing notwithstanding his prior conviction of a new offense. The fact of the new conviction does not ipso facto render 'the attending circumstances . . . factually undisputed' or leave as 'the only matter in issue . . . the legal consequences of an undisputed course of conduct' such that the court may 'without hearing any witness, rule on the matter' of the revocation of probation. (*People v. Vickers, supra*, 8 Cal.3d 451, 457, fn. 6, emphasis added.) Thus, 'summary resolution of the issue of revocation' (*id.*) is not appropriate following a probationer's conviction of a new offense unless the probationer waives his right to a formal revocation hearing." (*Id.* at p. 895, fn. 22.)

Here, as appellant asserts, the court, by proceeding solely on the basis of evidence that appellant had been convicted of a crime, determined appellant was in violation of probation but did not afford appellant a hearing on the issue of "whether under all the

circumstances this violation of probation warrants revocation.” (*People v. Coleman*, *supra*, 13 Cal.3d at p. 895, fn. 22.) Moreover, appellant did not waive his right to a hearing on this issue and, indeed, requested a contested hearing. Therefore, under *Coleman*, the court’s “ ‘summary resolution of the issue of revocation’ ” was “not appropriate.” (*Ibid.*)

### **DISPOSITION**

The order denying reinstatement of probation and lifting the stay on the previously imposed sentence is vacated, and that matter is remanded for a probation revocation hearing to be conducted in accordance with the views expressed in this opinion.